BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NANG THACH	)	
Claimant	)	
V.	)	
	)	Docket No. 1,073,117
FARMLAND FOODS	)	
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 21, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Thomas J. Walsh, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 15, 2015, with exhibits attached, and the documents of record filed with the Division. It was agreed at preliminary hearing, that claimant's accident arose "in the course of" his employment with respondent.

ISSUES

The ALJ found that although it is not completely clear what happened to cause the accident, there is sufficient evidence to establish claimant was moving his motorcycle to a different spot in respondent's parking lot and was planning on returning to work after his break. Therefore, claimant's break and his activities during it, including moving his motorcycle to a different spot, were incidents of his employment and arose out of and in course and scope of his employment with respondent. The ALJ found claimant entitled to

medical treatment and ordered respondent to provide claimant with the names of two physicians from which to choose an authorized treating physician, and to pay for all medical expenses related to the accident. Finally, claimant was awarded temporary total disability benefits (TTD) beginning January 29, 2015, and continuing until claimant is released to substantial and gainful employment, has been offered accommodated work within temporary restrictions or has reached maximum medical improvement.

Respondent appeals, arguing claimant's accident did not arise out of his employment, and since there is no evidence of a connection between the accident and claimant's employment, compensation should be denied and the ALJ's Order reversed.

Claimant contends the Order should be affirmed.

The issue on appeal is whether claimant's accident arose "out of" his employment.

FINDINGS OF FACT

Diep Thi Thach, claimant's sister and guardian, testified she became claimant's guardian after the accident because she is the only one in their family fluent in English and able to understand medical terms.

Ms. Thach first learned of the January 29, 2015, accident through phone calls and text messages from her mother and sister when she was at work. She first saw claimant at 7:30 a.m., before surgery and he was having involuntary spasms of his arms and legs and unable to move his mouth to form words. Claimant was in the hospital for 2 or 3 months and then was moved to Lincoln, Nebraska, for rehabilitation. He was there for 1½ months, and then he returned to Wichita and is living with his family.

Ms. Thach testified that claimant is unable to speak as fluently as he had before the accident, he has trouble finding words, his tone has changed and he has weakness in his right arm and right leg. She testified claimant suffered a severe traumatic brain injury from the accident and is not able to drive a car because he is not able to identify signs and his reflexes are slow. Claimant has short-term memory problems, with no memory of the accident. Ms. Thach testified claimant's memory comes and goes and it is hard for her to say if claimant has some recollections of before the accident.

Claimant is currently not receiving medical treatment because his workers compensation claim was denied and his health insurance ended in June or July of 2015.

Stanley Yost, testified he has worked for respondent for 12½ years. Mr. Yost is a third shift mechanic lead and worked with claimant. Mr. Yost testified it was not until 12:30 a.m., when he went on break, that he heard claimant had been in an accident.

Mr. Yost testified that second shift production work hours are 3:30 p.m. to 12:00 a.m., but they always had overtime, so they usually worked 10 hour days. Second shift maintenance work hours ended around 10:30 p.m. and they worked 8 hour shifts. Mr. Yost testified he works third shift maintenance, which started at 10:30 p.m. He indicated that everyone on third shift tries to take their break between midnight and 1:00 a.m. and take lunch at 3:00 a.m. He indicated there was no company rule that he knew of for taking breaks outside in the parking lot. He also had no knowledge of any company rule preventing a person from moving their vehicle on their break. He had no knowledge of where claimant parked his vehicle and did not know claimant rode his motorcycle that day.

Mr. Yost indicated there is a specific place on the north side of the entryway of the plant for motorcycle parking, and that vehicles are allowed to park in the motorcycle parking only area without being ticketed, so that when it is cold outside people would not have so far to walk into the plant. Since claimant's accident, the policy regarding the use of the parking stalls has changed for motorcycles. Mr. Yost testified that guards were put up to keep cars from parking in the motorcycles only area of the parking lot. He testified this was done after an ex-employee who rode motorcycles, started parking in the supervisors' parking because there was no parking in the motorcycle area. That employee was written up for parking in the supervisors' parking lot, the union got involved and the guards were put up so cars could not fit in the stalls.

Mr. Yost testified that the south area in the lot where claimant had his accident was lighted, but the lights at the north end of the lot were out. He indicated that only 4 of the 8 lights in the parking lot were working on the day of the accident. He testified it was pretty obvious where the motorcycle parking was, especially in the warm season.

Mr. Yost testified that claimant would show up to work at the last minute, but he could not recall any other time claimant parked in the supervisor lot and then moved his motorcycle during his first break. He is also not aware of anyone being punished for moving their car or motorcycle on break and knows of no policy prohibiting it.

Mr. Yost testified that when he arrived at work on January 29, 2015, the lot was pretty full and there were cars parked in the motorcycle lot. He also indicated that when he came out after the accident there were still cars parked in the motorcycle lot, but there may have been one spot open as the result of someone leaving.

Mr. Yost looked at claimant's motorcycle after the accident and helped move it to motorcycle parking. He did not see that it had hit any other vehicles. He had written a safety work order because, at 3:00 a.m. it is so dark , if people walked in front of you, you would not be able to see them. However, the accident took place on the south end of the employees parking lot where the lights there were working.

Tin Vinh Truong, claimant's brother-in-law, testified he has worked for respondent for 18 years. Mr. Truong works third shift like claimant. Mr. Truong verified that on the

night of the accident, claimant was driving a 2012 Kawasaki Ninja ZX-6R motorcycle. Mr. Truong testified claimant had been riding the motorcycle in question for eight months prior to the accident. When the weather was nice claimant would ride the motorcycle to work.

Mr. Truong first saw claimant at 11:00 p.m. on January 29, 2015. Mr. Truong indicated claimant was one of those employees who got to work right before he had to clock in. Mr. Truong indicated there is a penalty for clocking in late and if one clocks in late enough it could lead to termination. When Mr. Truong talked with claimant, claimant told him he needed to move his motorcycle at break because the motorcycle lot was full when he got there and he had to park in the handicap area in supervisor parking. Mr. Truong indicated that had claimant not moved his motorcycle, he would have received a ticket telling him that the motorcycle may be towed at the owner's expense, as a warning. He knows of no other consequence of parking in prohibited areas. He agreed the parking lot is usually full when third shift starts and starts to empty after the second shift leaves. Mr. Truong testified that second shift concludes between 11:30 p.m. and 12:00 a.m. and, as people leave, slots open in the parking lot.

Mr. Truong testified he met claimant at break time, but as they headed outside, he was stopped by another worker asking for help. He stopped and claimant went on. As Mr. Truong was helping the other worker, he heard the call about claimant over the radio. Mr. Truong made his way outside and saw Ryaan Mitchell on his way back in. He asked Ryaan what happened and was told claimant crashed. When he got to claimant's location, an ambulance was there and paramedics were working on claimant.

Mr. Truong did not speak to claimant as claimant was half knocked out. Mr. Truong could see claimant's motorcycle laying in the parking lot and it was dark in the lot. They searched for claimant's phone, using flashlights, but could not find it. He testified there were maybe three or four working lights in the lot. Mr. Truong helped move claimant's motorcycle to the motorcycle lot 25 to 30 feet away.

Mr. Truong indicated the initial thought was claimant hit a truck because a truck had damage on it and claimant's motorcycle was on the left side. But a maintenance work reported the truck in question had the damage before the accident. Since the accident, respondent has changed the motorcycle parking area by putting up barricades so only motorcycles can fit in those spots. Respondent has also increased the lighting in the parking lot.

Ryaan Mitchell has worked for respondent for two years. In January, Mr. Mitchell was working split shift 3:30 p.m. to 4:00 a.m. He indicated that prior to the accident he had a few conversations with claimant about improvements made to claimant's motorcycle. Mr. Mitchell testified that claimant showed him pictures and wanted him to look at the motorcycle. Mr. Mitchell testified that during their break, he and claimant went to the parking lot and looked at the motorcycle. Claimant was parked in the supervisor's parking area in a handicapped spot.

Mr. Mitchell and claimant talked about motorcycles for about 5 minutes and then claimant proceeded to move his motorcycle. Mr. Mitchell testified that claimant started off slow and then after he had driven a few cars down, he heard a noise and noticed claimant start to lose control. Mr. Mitchell testified, "I'm not sure if he was pushing down on the gas or he had started losing control by then and he had hit -- hit the, you know, the accelerator and that's what caused him to lose control".[1] Mr. Mitchell testified he was walking behind claimant as he was riding along. He had a clear view and saw claimant sway back and forth before the motorcycle hit the ground. Claimant hit the ground 5 cars down from the motorcycle parking spots.

Mr. Mitchell testified he called out to claimant after he fell and, when claimant did not answer, he ran over and found claimant to be unresponsive. One of the plant managers got to claimant at the same time, as she had also been outside. Mr. Mitchell was instructed to call security and an ambulance. He proceeded to the guard shack to call and then went back to work, as his break was over. Mr. Mitchell indicated it was a dry day and in the 40's. Mr. Mitchell testified claimant did not hit anything and there were no potholes or defects in the parking lot pavement that would have contributed to the accident.

Mr. Mitchell does not recall any of the lights in the parking lot being out, but admits the parking lot is not well lighted. He was standing no more than 10 feet from where the motorcycle went down. Mr. Mitchell had no idea why the accident happened. Claimant's motorcycle did not hit any other vehicle.

Claimant did not have his motorcycle helmet on at the time of the accident, but he was wearing his safety helmet. Mr. Mitchell believes claimant lost control and the motorcycle slid across the parking lot.

Aaron Stegman was safety manager for respondent's Smithfield facility in Wichita where claimant worked, at the time of claimant's accident.

Mr. Stegman testified he received a call after midnight about claimant's accident on January 29, 2015. He arrived at work at 6:30 a.m. on January 29 and conducted an investigation. He inspected the area where the accident took place and found no defects in the parking lot. He also looked for any type of moisture, loose gravel, substantial cracks or deviations in the pavement and found none, other than some hairline cracks. His investigation revealed nothing that would have contributed to claimant's accident. He also concluded claimant did not hit any other vehicles. He did not measure the level of lighting in the area of the accident, but determined it was adequate. Mr. Stegman is not an accident reconstructionist.

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[1] P.H. Trans. at 84.

Mr. Stegman testified employees are not to park in handicapped parking out of common sense and governmental law, unless you have a handicap parking permit. He testified respondent does not have a specific policy regarding handicapped parking. He could not recall any employee being told to go out and move their vehicle if they were parked in a wrong spot, but warning tickets were given out by security. There is no disciplinary action attached to the ticket. He also admitted that there were times employees would move the temporary barriers that had been placed in the motorcycle parking area in order to park their vehicles. Mr. Stegman testified that heavier more permanent barriers were put in motorcycle parking in the spring because, with the increase of riders because of the warm weather, it would be harder for someone with a car to move the barrier and take the spot.

Mr. Stegman testified there are 280 to 300 employees who work during the day and about 100 in the evening, so there are less cars in the employee area in the evening. Mr. Stegman watched the video of the parking lot, marked as respondent's Exhibit 3, which actually shows claimant leaving the handicapped parking spot. Mr. Stegman testified that, when claimant passed the motorcycle parking area, there were "a couple spots open for motorcycle parking."[2] However, he later acknowledged he could not tell on the video which motorcycle slots were open.[3]

Mr. Stegman indicated he knew nothing about poor lighting in the parking lot, but admitted the lighting in the north end of the lot was upgraded after January 2015. However, the lighting in the area of the accident has not changed. Mr. Stegman acknowledged there was no company policy prohibiting claimant from moving his motorcycle during his break.

John Schellhorn, claimant's supervisor, testified he had not instructed claimant to move his motorcycle. He did not speak with anyone about why claimant was in the parking lot moving his motorcycle. Mr. Schellhorn indicated there is no rule prohibiting employees from taking their break in the parking lot or from moving their vehicle in the parking lot on their break.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

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[2] *Id.* at 108.

[3] *Id.* at 124.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(d) states:

(d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2014 Supp. 44-508(g) states:

(g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

There is no argument this accident occurred while claimant was in the course of his employment with respondent. Claimant was at work, he had clocked in, he was on respondent's premises and was on a sanctioned break.

The question is whether this accident arose "out of" claimant's employment with respondent. The Board has traditionally drawn a distinction between injuries occurring on a short, authorized break versus a longer, lunch type break where a worker is generally free to leave the employer's premises at the time of the accident.[4]

The injured worker in *Burghart*[5], was on his authorized 20-minute break and was walking across the first floor lobby of the employer's building when he slipped and fell on a wet floor. Mr. Burghart was going to meet his wife to sign personal banking documents at the time of the accident. The Board found Mr. Burghart's personal errand was not so unusual or unreasonable that his actions took him outside the incidents of his employment.

A significant factor in *Burghart* is that it occurred prior to the implementation of the 2011 revisions to the Kansas Workers Compensation Act (Act).

The Kansas Supreme Court has cautioned that the first step in an analysis is to simply read the statutory language, giving common works their ordinary meanings. Where the statute is plain and unambiguous, a court need not resort to canons of construction to construe legislative intent. Therefore, this Board Member must look to the language of the "new" Act to determine, if possible, legislative intent, and how it affects this claim.

When the Kansas Legislature rewrote the Act in 2011, significant modifications and limitations were implemented. The legislature more clearly defined the risks considered compensable and those which are not.

Under K.S.A. 44-508(f)(2)(B)(i), an injury by accident shall be deemed to arise out of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident. This provision, enacted as part of the new Act, effective May 15, 2011, arguably embodies prior case law.

It is stated in *Newman*[6],

> An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions obligations and incidents of the employment.

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[4] *Williams v. Allied Staffing*, No. 1,058,426, 2012 WL 1142973 (Kan. WCAB March 28, 2012).

[5] *Burghart v. Key Staffing*, No. 1,053,105, 2011 WL 2185278 (Kan. WCAB May 25, 2011).

[6] *Newman v. Bennett*, 212 Kan. 562, 512 P2d 497 (1973).

Prior to the 2011 Act, the Kansas Supreme Court, in *Hensley*[7], established three general categories of workplace risks: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. The risks in the first category are universally compensable. The risks falling in the second category do not rise out of employment and are not compensable. Under the third category, compensability depended on the facts surrounding the injury.

K.S.A. 44-508(f)(3)(A)(ii), a part of the 2011 statutory amendments, provides that the words "arising out of and in the course of employment" shall not be construed to include an accident or injury which arose out of a neutral risk with no particular employment or personal character. This provision represents a departure from a number of appellate decisions which concluded that neutral risks may be compensable. Neutral risks are no longer considered compensable. The Legislature appears to have more restrictively defined "out of" and "in the course of" employment.

In this instance, claimant was performing a personal or neutral errand, moving his motorcycle during his break. It is acknowledged claimant risked receiving a ticket for parking in a handicapped parking space in the supervisors lot. However, the decision to park there was his own. The decision to move the motorcycle during his break was also his own. No supervisor instructed him to do so. In fact, claimant's supervisor was not even aware claimant was moving the motorcycle until he was told of the accident. This action by claimant cannot be said to arise "out of" his employment with respondent as the risk was either neutral or personal to claimant.

This Board Member finds the decision by the ALJ to hold this accident compensable should be reversed and the award of benefits to this claimant denied. Claimant has failed to prove his accident arose "out of" his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed. Claimant has failed to prove this accident arose "out of" his employment with respondent.

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[7] *Hensley v. Carl Graham Glass*, 266 Kan. 256, 597 P.2d 641 (1979).

[8] K.S.A. 2014 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant dated December 21, 2015, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge